IN THE

Supreme Court of the United States

No. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

Appellees in this case do not believe that the facts as alleged in the Bill of Complaint give rise to or require an answer to the legal questions proposed by Appellants on page three (3) of their Brief under the heading, "QUESTIONS PRESENTED".

Appellees suggest that the questions of law which arise out of the facts of this case are as follows:

1. The jurisdictional question:

   Was this action "required" to be heard and determined by a three judge district court?

2. As to the merits:

   (a) Is a grant of authority by a state to its municipalities, to exercise extraterritorial regulation, unconstitutional, per se, under either the Due Process or Equal Protection Clause of the Fourteenth Amendment?

   (b) Is the rule of law, established by the "voting rights" cases and the "compelling state interest" test for application of the Fourteenth Amendment developed therein, applicable to grant of authority by a state to a municipality to extend and enforce police and sanitary regulations beyond the city's territorial limits?

STATEMENT OF THE CASE

Plaintiffs-Appellants are Holt Civic Club, an unincorporated association, and eight individual members thereof who reside in an area sometimes referred to as the Holt Community, an unincorporated community outside of the corporate limits of the City of Tuscaloosa,

but within the police jurisdiction thereof. Appellants seek to represent a class of residents who live outside incorporated municipalities, but within the police jurisdiction.[1]

Defendants-Appellees are the City of Tuscaloosa, a municipal corporation, three (3) members of the Commission Board (the governing body of the City), and the Municipal Judge (formerly City Recorder). Defendants are said to be representative of a state-wide class composed of municipalities and municipal officials.

Appellant's primary allegation, in the twice amended complaint is that as residents of the Tuscaloosa Police Jurisdiction, they are governed by Tuscaloosa ordinances, but are not able to vote in municipal elections, resulting in a denial of due process and equal protection of the laws under the Fourteenth Amendment. Appellants also allege that each extension of a municipal corporate limits extends the police jurisdiction, expanding the denial of the right to vote and brings additional persons within the police jurisdiction without their permission and without due process of law.[2]

Broadly, the complaint challenges the authority of the State to authorize its cities to extend and enforce any police or sanitary regulation beyond the city's territorial limits.

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1 Under Alabama Law, the police jurisdiction is defined as that area adjacent to and surrounding the corporate limits, extending 3 miles from cities having population of 6000 or more, and 1 ½ miles from cites having population of less than 6000.

2 Appellants have never insisted on or pursued the extension of jurisdiction allegation.

The complaint asks that the following three statutes be declared unconstitutional, insofar as they permit any regulation to extend beyond the limits of the municipality, and enjoin their enforcement to that extent.[3]

Title 37, Section 9, is the state enabling legislation which permits ordinances of a city or town, enforcing police or sanitary regulations, to have force and effect *in the limits of the city or town and in the police jurisdiction thereof.* (emphasis added)

Title 37, Section 733, is the codification of an Act adopted in 1927 and purports to grant to municipalities the right to charge a limited privilege license outside of the city limits but within the police jurisdiction.[4]

Title 37, Section 585, which has recently been substantially changed by the adoption of the Alabama Judicial Article, simply gives to the municipal court jurisdiction to prosecute for breaches of ordinances of the municipality within its police jurisdiction.

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3 Since the filing of this case, Alabama has adopted a new code of laws and, although references to the sections of Title 37 are not now correct, since all references in the bill of complaint and in the orders of the district court refer to Title 37 sections, we will continue to do so for convenience. There were minor changes in the sections but, insofar as this case is concerned, we believe those changes are not pertinent. The statutes are set out at length in Addendum "B" to the Appellants' Brief.

4 As we will show by subsequent argument, this section added nothing to existing law under interpretation of the Alabama Superme Court, and its only real effect is now to limit any charge for services rendered to an amount equal to not more than one-half of a similar charge which may be exacted within the corporate limits. Appellants point out in their brief that any authority granted under this ordinance would fall, should the court strike down Title 37, Section 9 (above).

The main thrust of the appellants' complaint and argument is that Title 37, Section 9, which permits ordinances of a city or town, enforcing police or sanitary regulations, to have force and effect within the limits of the city or town and in the police jurisdiction thereof, is a violation of appellant's right of due process and equal protection under the Fourteenth Amendment since appellants are not permitted to vote in municipal elections. Appellants contend that the rule of law established in the so-called "voting rights cases" should prevail, and that any extraterritorial jurisdiction granted by a state to its municipal corporations should be subjected to the "strict judicial scrutiny" requirement established and made applicable to the Fourteenth Amendment in the voting rights cases.

Initially, the single judge federal district court dismissed the complaint for failure to state a claim upon which relief could be granted. The court found that a three judge court was not required to be convened under 28 USC, Section 2284 on grounds, among others, that, (1) the state statutes sought to be enjoined were in effect, enabling acts which should be treated, for the purposes of Section 2284, as local acts or ordinances, (2) no state officer was named and that municipal officials were performing acts local in nature and not of statewide application, and (3) the complaint lacked traditional equitable allegations sufficient to confer equitable jurisdiction.[5]

On appeal to the Fifth Circuit, the case was reversed and remanded to the district court for the convening of a three judge court. *Holt Civic Club* v

[5] See Memorandum Opinion of Chief Judge Frank H. McFadden, set out in full at page 18(a) and following, of the Appellants' Jurisdictional Statement.

City of Tuscaloosa, 525 F. 2d 653 (5th Cir. 1975).

Defendant renewed its Motion to Dismiss before the three judge court and the motion was granted. Plaintiffs-Appellants seek direct appeal to the Supreme Court under 28 U.S.C. 1253.

SUMMARY OF ARGUMENT

A. The Jurisdictional Question.

Appellants herein challenge state enabling legislation which permits police or sanitary regulations to extend and be enforced beyond the City's territorial limits and within the police jurisdiction thereof. Appellants do not allege or contend that any particular police regulation or sanitary regulation is applied to them in an unconstitutional manner, or that there is any threat that such regulations will be applied in an unconstitutional manner. (Appellants Brief, pp. 8 and 17).

Although Appellants allege some past incidences involving collection of fees for services rendered, they do not allege any existing live controversy involving them and a specific police or sanitary regulation; nor do they allege any injury, or threat of injury, from such regulations, but rely for jurisdiction on the contention that, being subjected to regulations of a police and sanitary nature, they are, in effect, governed by the City; that they are not allowed to vote in City elections, and that the denial of the right to vote is an infringement of their constitutional right under Due Process and Equal Protection.

Appellants simply assume that the law arising out of the facts in the "voting rights" cases applies to the facts alleged in the Bill of Complaint in this case. We

recognize that, in the "voting rights" cases, a simple allegation that a classification disfavors the voters in the county where they reside, or that they are placed in a position of constitutionally unjustifiable inequality to other voters, is a sufficient allegation of injury since this court has held that a citizen's right to vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the constitution. *Baker* v. *Carr*, 369 U.S. 186 (1962). The grant by a state to its municipalities of the authority to extend police and sanitary regulations into the police jurisdiction, and to apply them in the same manner as they are applied within the corporate limits, has not been judicially declared to suffer from constitutional infirmity, and does not, without more, confer the right to vote.

We argue that the Plaintiff-Appellants lack standing in this case. *Warth* v. *Seldon*, 422 U.S. 490 (1975); *Flast* v. *Cohen*, 382 U.S. 83 (1968).

We argue further than in this case, although the Appellants allege, as a conclusion of the pleader, that they are denied the right to vote in municipal elections, the affirmative factual allegations indicate that they are not bona fide residents of the political subdivision, that they are not a part of the political unit, that they are not among those persons to whom the franchise has ever been granted, and that the existence of the basic right to vote is absent. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Garren* v. *City of Winston-Salem*, 463 F.2d 54, (4th Cir. 1972), cert. den., 409 U.S. 1039 (1972); *Evans* v. *Cornman*, 398 U.S. 419 (1970).

An allegation that Plaintiffs are denied the right to vote, when alleged as a conclusion of the pleader, and along with allegations of facts which clearly negate

such right, falls short of alleging a case or controversy under the constitution.

We urge therefore that the action herein was not required to be heard and determined by a district court of three judges and that this court should not entertain the same on direct appeal. *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Moody* v. *Flowers*, 387 U.S. 97 (1967).

Pursuing the same argument to the effect that enabling legislation by a state, which permits police or sanitary regulations to extend and be in force beyond the city's territorial limits, is not, per se, unconstitutional or a violation of the fundamental law, we insist that the complaint fails to allege facts required to confer equitable jurisdiction or the right to equitable relief. There is no allegation (and Appellants concede this) that any one or more of the Appellants in this case is in any jeopardy of suffering irreparable injury resulting from extraterritorial extension of any specific police or sanitary regulation. *American Federation of Labor* v. *Watson*, 327 U. S. 585 (1946).

B. To the Merits.

It has been, and is, the contention of Appellees that under the meager allegations of the complaint herein, if case or controversy and standing can be found, (in the absence of alleging hurt, injury or controversy to any named Plaintiff arising from the enforcement of any specific regulation adopted pursuant to the enabling legislation), the only question substantially presented is whether or not the state statute enabling municipal police and sanitary regulations to extend beyond the city's territorial limits, is unconstitutional, per se, under either the Equal Protection or Due Process Clause.

This is not an orthodox "voting rights" case and the principle of those cases cannot be rationalized to support Appellants' claim that they have been denied equal protection of the laws as a result of being denied equal voting rights. *Garren* v. *City of Winston-Salem*, 463 F.2d 54 (4th Cir. 1972), cert. den., 409 U.S. 1039 (1972). The concept of law developed and established in the "voting rights" cases is particularly inappropriate to the facts in the instant case since the Appellants are not a part of and have never been a part of the political unit; they do not reside within the geographic boundaries of the city; they make no claim to have met residence requirements for voting. Neither the Appellants nor any other person similarly situated have ever been given the right to vote. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Pope* v. *Williams*, 193 U.S. 621 (1904).

As to the "compelling state interest" doctrine, Appellants herein do not allege facts showing an invidious discrimination or suspect classification, *McDonald* v. *Board of Election Comm. of Chicago*, 394 U.S. 802 (1969), or that state power is being used as an instrument to circumvent a federally protected right. *Gomillian* v. *Lightfoot*, 364 U.S. 339 (1960).

This court has held that a citizen's right to vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the constitution, *Baker* v. *Carr*, 369 U.S. 186 (1962); that statutes limiting the franchise should be given a close and exacting examination since the right to exercise a franchise in a free and unimpaired manner is preservative of other basic civil and political rights; that any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized; that this is necessary since "*statutes distributing the franchise constitute the foundation of our representative society*". *Dunn* v. *Blumstein*, supra, (emphasis added); *Kramer* v. *Union Free School District*, supra. We argue that the granting of extraterritorial jurisdiction by a state to its political subdivision does not constitute an attack on the "foundation of our representative society". We know of no case, and no case has been cited to us, which holds that state enabling legislation extending police or sanitary regulations beyond the city's territorial limits is, per se, unconstitutional. Existing law is to the contrary.

We argue that the facts in this case should be judged under the Equal Protection Clause of the Fourteenth Amendment by the traditional standard of review which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973).

ARGUMENT

THE JURISDICTIONAL QUESTION

Although the Fifth Circuit Court of Appeals has ruled to the contrary, it has been and is the opinion of the Appellees that this action was not "required" to be heard and determined by a district court of three judges, and that this court should not entertain the same on direct appeal. *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Moody* v. *Flowers*, 387 U.S. 97 (1967).

In order to properly determine this question and in order to properly address this case at all, Appellees ask

the court to look at the Bill of Complaint in the eyes of a district or trial judge, and consider the allegations appearing on the face of the Complaint.

Appellants allege, apparently to show the inequality of their position, that the City of Northport or most of it is within three (3) miles of Tuscaloosa and that this City is not subject to the exercise of Tuscaloosa Police Jurisdiction, but that the residents who are in the community known as Holt area are subject to such regulations. Such allegation is without merit in that it completely ignores the fact that Northport is a second duly constituted municipal corporation contiguous to that of the City of Tuscaloosa, although lying on the North side.

Appellants have made the assumption, and we submit the erroneous assumption, that the rule of law so clearly established for the "voting rights" cases has been or should be extended to apply to any case wherein a state grants any vestige of extraterritorial jurisdiction to its municipalities. Appellants simply assume that the traditional standard of review under the Fourteenth Amendment, (that the State's system be shown to bear some rational relationship to legitimate State purposes) has been or should be abandoned, and that the strict judicial scrutiny test followed in the "voting rights" cases should be applied.

A close examination of the complaint shows an absence of allegations of any specific hurt or injury to any named plaintiff as a result of any municipal ordinance enforcing police or sanitary regulations extraterritorially. There is no specific allegation of live controversy.

Appellants' only attempt to allege facts showing a case or controversy normally required to vest jurisdiction in a federal court is set out in paragraph 13, subparagraphs (a), (b), (c), (d), and (e), of the complaint. (Appellants Br., p. 7 & 8).

In 13 (a), it is alleged that Plaintiff, Clyde Jones, has been required to purchase a license to engage in business in the police jurisdiction. There is no allegation that he is presently engaged in business or that he is now, or will in the future be, required to take out or pay for a license.

In paragraph 13 (b), it is alleged that two of the Plaintiffs have, at some time in the past, been required to purchase building permits from the City of Tuscaloosa and submit to inspections of building. There is no allegation that they are now engaged in such building or that they are now liable for building permits, or that they will in the future be so liable.

In paragraph 13 (c), it is alleged that several of the plaintiffs have been required to pay Tuscaloosa city tax on cigarettes bought within the Police Jurisdiction. It is common knowledge that no municipality in the State of Alabama is vested with the right to fix a tax on any person for the purchase of cigarettes, either within or without the City. The City of Tuscaloosa is authorized only to fix a privilege license based on the privilege of engaging in business.[1] Such a license might or probably does indirectly result in higher prices for items sold, but allegations such as those set out in 13 (c), (d) and (e), which in effect state that Plaintiffs have been required to pay higher prices because of a business license paid by a merchant or wholesaler, are not such allegations as would normally get a plaintiff into court. As stated in *Salyer* v. *Tulare Water District*,

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[1] Sec. 11-51-91, Code of Alabama, 1975.

410 U.S. 719 (1973), "Constitutional Adjudication cannot rest on any such house that Jack built foundation." *Salyer*, supra, 410 U.S. at 731.

Since some of Plaintiffs' allegations concern Title 37, Section 733, its legal effect should be clarified. Title 37, Section 733, purports to enable cities to fix a privilege license or privilege tax on trades or businesses conducted within the Police Jurisdiction, in an amount not to exceed fifty percent (50%) of that fixed within the corporate limits. Under judicial interpretation, the Alabama Supreme Court has held that a municipality may not adopt a license or ordinance effective within the police jurisdiction for the purpose of general revenue. The only authority the city has is the authority to charge a fee for regulation not to exceed the reasonable cost of services rendered. *Van Hook* v. *City of Selma*, 70 Ala. 361, 45 A.R. 85 (1881). Back as far as 1881, the cities were making some charges for municipal services outside of the city. In *Alabama Gas Co.* v. *City of Montgomery*, 249 Ala. 257, 30 So.2d 651 (1947), Title 37, Section 733, was construed, and the court concluded that this statute added nothing to the power or authority of the city to charge a fee outside of its corporate limits. It did hold, however, that the fifty percent (50%) maximum limitation applied, and also that the provisions limiting or apportioning the jurisdiction between two municipalities with overlapping police jurisdictions should apply.

Recently, the Alabama Supreme Court has ruled that a license tax or fee charged to a business or establishment outside of the corporate limits, but within the police jurisdiction, is invalid unless, in fixing such fee or license, the municipality makes an affirmative showing that the fee is based on the reasonable cost

of services provided. *City of Hueytown* v. *Burge*, Ala., 342 So.2d 339 (1977).

Appellees point to the provisions of 28 USC Section 1341, and insist that the district court has no jurisdiction in the matters alleged pertaining to licenses, taxes and fees, and has no jurisdiction to grant declaratory or injunctive relief in relation thereof.

Houston v. *Standard-Triumph Motor Co*, 347 F.2d 194 (5th Cir. 1965), cert. denied, 382 U.S. 974 (1966);

Annotation 17 L.Ed.2d 1026.

There is no allegation in the bill of complaint that any named plaintiff purporting to represent a class of plaintiffs, has been subject to the provisions of any ordinance of the City of Tuscaloosa enforcing police or sanitary regulations, (other than the payment of licenses or fees), and no allegation that any such person has been brought before the recorder of the municipality and fined or penalized for the violation of such ordinance, nor is it alleged that any such person has been threatened with such violation or penalty.

Appellees contend that these individual plaintiffs, alleging no actual case or controversy under any ordinance adopted pursuant to state enabling legislation (other than vague and past controversies involving the payment of taxes and fees where the court's jurisdiction is withheld), and having suffered no prosecution in recorder's court, fail to allege a justiceable controversy and lack standing to prosecute this case.

We recognize that, in the "voting rights" cases, a simple allegation that a classification disfavors the voters in the county where they reside, or that they are placed in a position of constitutionally unjustifiable

inequity to other voters, is a sufficient allegation of injury since this court has held that a citizen's right to vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the Constitution. *Baker* v. *Carr*, 369 U.S. 186 (1962). We argue that the grant by a state to its municipality, of the authority to apply police and sanitary regulations within the police jurisdiction in the same manner as they are applied within the corporate limits, does not confer the right to vote and has not been judicially declared to suffer from any constitutional infirmity; that Title 37, Section 9, is not, per se, unconstitutional under either Due Process or Equal Protection of the Fourteenth Amendment.

Under this view, we would argue that the plaintiff-appellants lack standing. *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Baker* v. *Carr*, supra; *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

The argument may be made that *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719 (1973), is authority for holding that Plaintiffs herein have standing. In *Salyer*, non-property owners alleged that they were denied the right to vote in Water Storage District's general elections; that the vote, given only to landowners and weighed in favor of large landowners, violated their Fourteenth Amendment rights. The court there held that although Plaintiffs did not fall within the gamit of the "voting rights" cases, and could not rely on the strict state interest test developed therein, they were entitled to have their equal protection claim assessed to determine whether or not the state's action was "wholly irrelevant" to the achievement of its objectives.

We point out, however, that in *Salyer*, the Plaintiffs were resident citizens living in the area of the Water District and persons who had been granted the franchise and were part of the electorate for political purposes other than voting in the Water Storage District elections.

In this case, although the Appellants allege, as a conclusion of the pleader, that they are denied the right to vote in municipal elections, the affirmative factual allegations show that Appellants are not bona fide residents of the political subdivision where they seek to be allowed to vote; that they are not among those persons to whom the franchise has ever been granted; and that the existence of the basic right to vote is absent.

Dunn v. *Blumstein*, 405 U.S. 330, (1972);

Garren v. *City of Winston-Salem, N.C.*, 463 F.2d 54, (4th Cir. 1972), Cert den 409 US1039 (1972);

Evans v. *Cornman*, 398 U.S. 419 (1970).

An allegation that the Plaintiffs are denied the right to vote, when alleged as a conclusion of the pleader and along with allegations of facts which clearly negate such right, falls short, in our opinion, of alleging a case or controversy under the Constitution.

EQUITABLE JURISDICTION

This court has long required that a claim to equitable relief must show a controversy which will cause actual harm to plaintiff and that a court of chancery will not entertain a bill which seeks merely a declaration of future rights. *Cross* v. *DeValle*, 1 Wall. 5, 68

U.S. 5 (1863). The rule is clearly established that equity will not entertain a suit merely to vindicate an abstract principal of justice or to determine a dispute which involves neither benefit to be gained not injury suffered. *Foster* v. *Mansfield C. & L. M. R. Co.*, 146 U.S. 88 (1892).

In this case, however, we are faced with a much stricter rule which was pronounced by *American Federation of Labor* v. *Watson*, 327 U.S. 585 (1946). There the court said:

> "Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only to prevent irreparable injury which is clear and eminent." *AFL* v. *Watson*, supra, 327 U.S. at 593.

Here the court was actually determining the applicability of a three judge court.

In the instant case, the complaint falls far short of alleging a threat of irreparable injury which is immediate and not remote. There are no allegations indicating irreparable injury which is clear and eminent. There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeojardy of suffering irreparable injury resulting from extraterritorial regulations and hence, the complaint fails to allege facts sufficient to invoke traditional equitable jurisdiction and there is no need to convene a three judge court. *Boyle* v. *Landry*, 401 U.S. 77 (1971).

STATE STATUTE OF STATE-WIDE APPLICATION

In his memorandum opinion, Judge McFadden makes a very fine case that the challenged statute is not a state statute of general state-wide application.

(Appellant's jurisdictional statement, page 26 (a) through 37 (a). We agree with the trial court and point out further that 28 USC Section 2284, subparagraph (2) requires that at least five (5) days notice of hearing be given to the governor and attorney general of the state in those cases where action involves enforcement operation or execution of state statutes or state administrative orders. That was not done in this case.

Appellees, in their jurisdictional statement, filed a motion to affirm, (rather than a motion to dismiss or affirm), for the reason that, first, the Fifth Circuit had already ruled that a three judge court was required, *Holt Civic Club* v. *City of Tuscaloosa*, 525 F.2d 653 (5th Cir. 1975), and, secondly, because the three judge court did in fact rule on the merits. Notwithstanding this, however, if there is lack of standing or insufficient allegations to invoke equitable relief or to demonstrate an attack on a state statute of state-wide application, then a three judge court would not be required and the rule of *Moody* v. *Flowers*, 387 U.S. 97 (1967), and *Perez* v. *Ledesma*, 401 U.S. 821 (1971) would apply.

A GRANT OF AUTHORITY BY A STATE TO ITS MUNICIPALITIES TO EXERCISE EXTRATERRITORIAL REGULATION IS NOT UNCONSTITUTIONAL PER SE UNDER EITHER THE DUE PROCESS OR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION

The powers of a state over its political subdivision and its citizens have historically been held to be, and are, broad and within the discretion of the state. *Sailors* v. *Board of Education of Co. of Kent*, 387 U.S. 105

(1967); *Reynolds* v. *Simms*, 377 U.S. 533 (1964); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907).

In *Hunter*, the following appears:

> "It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon whenever they are applicable. Municipal corporations are political subdivisions of the state created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently, they usually are given the power to acquire, hold and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . the state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens or even against their protests. In all these respects, the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States . . . the power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." *Hunter*, supra, 207 U.S. at 178-179.

In *Reynolds*, the following appears.

> "Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in carrying out of state governmental functions. As stated by the court in *Hunter* v. *City of Pittsburgh*, (citation omitted), these governmental units are created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them, and the number, nature and duration of the powers conferred upon them and the territory over which they shall be exercised, rests in the absolute discretion of the state." *Reynolds*, supra, 377 U.S. at 575.

Historically, municipalities have been granted some extraterritorial regulation by the state and such grants, subject to traditional standards of review, have been recognized as within the police power of the state. Roman cities were normally and usually constructed behind walls and the term for the powers exercised within the walls was termed, "intramural" and outside of the walls was termed, "extramural". *Maddox Extraterritorial Powers of Municipalities in the United States* (1955).

In *McQuillin, Municipal Corporations*, 1966 Rev. Vol. 2, at Section 10.07, the following appears:

> "Sec. 10.07. *Intramural and Extramural.*
>
> Powers of municipal corporations are sometimes classified as (1) intramural and (2) extramural, the former indicating those powers which lawfully and effectively may be exercised within the corporate limits for the benefit of the inhabitants and all those who are within the municipal area; and the later indicating those powers which lawfully may be exercised beyond

the corporate limits. In short, intramural powers are those effective within the corporate limits and extramural are those effective without. Extraterritorial powers of some kinds are in some states expressly conferred on municipal corporations by the state constitution, or by statutes, or charters. And the rule is well established that the legislature may confer such extraterritorial power, at least for certain purposes, unless prohibited by the state constitution."

We quote the above from *McQuillin*, and the following from C.J.S. and American Jurisprudence to emphasize that the granting of extraterritorial powers by the state to its municipalities have traditionally and historically been considered a lawful and not an unlawful exercise of the police power.

In *62 C.J.S. 141*, the following appears:

"The legislature may, and often does, expressly or by implication, grant to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits, especially for the preservation of public health, and accordingly, municipal corporations may have the implied right to exercise certain extraterritorial police powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the corporation."

In *56 Am. Jur. 2d, Sec. 436*, the following appears:

"The legislature has the power to confer on a municipal corporation police jurisdiction over adjoining territory immediately next to and within a specified short distance of the corporate limits. *There is no violation of the fundamental law* in a statute or charter provision under which some of the police regulations of

a municipality extend beyond its territorial limits . . ." (emphasis added).

Under rulings of this court, the Fourteenth Amendment is held not to prohibit states or political subdivisions thereof from prescribing regulations under their police power, limited in either the objects to which they are directed or by the territory in which they are to operate, so long as all persons subjected to such legislation are treated alike under similar circumstances, both in the privileges conferred and in the liabilities imposed. *Marchant* v. *Pennsylvania Railroad Co.*, 153 U.S. 380 (1894); *Hayes* v. *Missouri*, 120 U.S. 68 (1887); and *Barbier* v. *Connolly*, 113 U.S. 27 (1884).

In *Barbier*, the court held:

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws', undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under alike circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, . . ." *Barbier*, supra. 113 U.S. at 31.

When a statute or ordinance adopted under the police power is claimed to be contrary to due process and equal protection, the general test to be applied is that the classification bears some rational relationships to legitimate state purposes. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973).

Those attacking the law and the classification are required to bear the burden of showing that there is no

reasonable basis for it and that the classification is essentially arbitrary. *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719 (1973); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Kotch* v. *Board of Riverport Pilot Comm'rs.*, 330 U.S. 552 (1947); *Metropolitan Casualty Ins. Co.*, v. *Brownell*, 294 U.S. 580 (1935); and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

In discussing the standard to be applied when the argument is made that a statute adopted under the police power bears no rational or substantial relation to the object of the legislation, and that the same was arbitrary, capricious and hence invalid under the Fourteenth Amendment, the court, in *McGowan*, held as follows:

> "Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some group of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power, despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan*, supra, 366 U.S. at 425-426.

Since the pleadings in this case point to or single out no specific ordinance of the city which enforces police or sanitary regulations extraterritorially, it can only be said that the issue raised herein is whether or not the grant or any grant of authority by the state to its municipality to extend police and sanitary regulations beyond its territorial limits is unconstitutional, per se, under either the Due Process or Equal Protection Clause of the Fourteenth Amendment.

Appellants herein ask this court to abandon the concepts of law developed in *Hunter* v. *City of Pittsburgh*, supra, and its progeny, to the general effect that the number, nature and duration of the powers conferred upon municipalities and the territory over which they are to be exercised rests in the absolute discretion of the state and to abandon the rule of law developed in the cases preceding the following *McGowan* v. *Maryland*, supra, to the effect that:

> "A century of supreme court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state's system be shown to bear rational relationship to legitimate state purposes." *San Antonio School District* v. *Rodriguez*, supra, 411 U.S. at 40.

and to adopt and apply the rational or the voting rights cases.

We urge that this not be done.

THE RULE OF LAW APPLICABLE TO THE "VOTING RIGHTS" CASES AND THE COMPELLING STATE INTEREST TEST DEVELOPED TO PROTECT THE RIGHT TO EXERCISE THE FRANCHISE IN A FREE AND UNIMPAIRED MANNER IS NOT APPLICABLE TO A GRANT OF EXTRATERRITORIAL AUTHORITY BY A STATE TO ITS MUNICIPALITY.

In the instant case, the Appellants cite no case indicating that Alabama may not delegate to local governments a portion of its police power which comes

under the heading of Police and Sanitary Regulations. In fact, no argument is made to that effect, and the holdings are numerous and undisputed that within constitutional limits, a local government may exercise that power unchecked and may exercise it within further limits, extraterritorially. Appellants have presented no law which would undercut this presumption of constitutionality, and make no allegations of invidious classifications.

Appellants argue, however, that the operation of Title 37, Section 9, infringes on the constitutionality of a guaranteed right . . . here, the right to vote. Appellants analogize their position to that of those who prevailed in the "voting rights" cases which have held that any denial or dilution of the right to vote, once that right has been found to exist, is a denial of equal protection of the laws. In this case, however, Appellants do not contend that they meet any of the voter requirements for voting in Municipal elections. Thus, the existence of the basic right is absent. This would preclude Appellants from asserting that they are denied the right to vote in Municipal elections since they have no standing to do so. *Garren* v. *City of Winston-Salem*, 463 F.2d 54 (4th Cir. 1972), cert. den., 409 U.S. 1039 (1972).

In *Garren*, speaking of extraterritorial zoning, it was held:

> "This is not, however, an orthodox "voting rights" case. Nor do we think the principles of these cases can be rationalized to support Appellants' claim that they have been denied equal protection of the laws as a result of being denied equal voting rights. Appellants have not been denied any constitutionally protected rights of franchise or equal representation in municipal affairs. This is so simply because, not being bona fide residents of Winston-Salem, they have no standing to assert such rights." *Garren*, supra, 463 F.2d at 57.

We point out that residents of the police jurisdiction are subject to no different application of police and sanitary regulations than the residents of the City of Tuscaloosa. The fact that the residents of the police jurisdiction do not enjoy the same recourse to the ballot box is not the result of an invidious or suspect classification, or any other act of overt discrimination.

Concepts of law, developed and established in the "voting rights" cases, seem particularly inappropriate under the facts in the instant case. Appellants do not reside within the geographic boundaries of the City; they make no claim to have met residence requirements for voting. Neither the Appellants nor any other person similarly situated have ever been given the right to vote. *Dunn* v. *Blumstein*, 405 U.S. 303, (1972); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Pope* v. *Williams*, 193 U.S. 621 (1904).

In addition, the constitutional guaranty of the right to vote under the Equal Protection Clause of the Fourteenth Amendment is neither alleged nor prayed for.

We find no case in which this court has given the franchise to persons who did not actually fulfill the requirements of bona fide residence.

Appellants cite *Evans* v. *Cornman*, supra, as precedent from this court that residence requirements be disregarded as a condition for voting. In *Evans*, however, the court held:

"Maryland may, of course, require that all applicants for the vote actually fulfill the requirements of bona fide residence (citations omitted). But if they are in fact residents, with the intention of making (the state) their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation." *Evans*, supra, 398 U.S. at 421.

The Court goes on to say, in the *Evans* case, that:

"This court has, of course, recognized that the states have long been held to have broad powers to determine the condition under which the right of sufferage may be exercised . . . *Once a franchise is granted to the electorate*, lines may not be drawn which are inconsistant with the Equal Protection Clause of the Fourteenth Amendment." *Evans*, supra, 398 U.S. at 422, (emphasis added).

In *Dunn* v. *Blumstein*, (supra), the following appears:

"We have in the past noted approvingly that states have the power to require that voters be bona fide residents of the relevant political subdivision. *E.g.*, *Evans* v. *Cornman*, 398 U.S. at 422; *Kramer* v. *Union Free School District*, supra, at 625; *Carrington* v. *Rash*, 380 U.S. at 91; *Pope* v. *Williams*, 193 U.S. 621." *Dunn*, supra, 405 U.S. at 343.

Appellants herein do not allege facts showing an invidious discrimination or suspect classification, *McDonald* v. *Bd. of Elections Com. of Chicago*, 394 U.S. 802 (1969), or that state power is being used as an instrument to circumvent a federally protected right. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

In their effort to liken the facts of this case to those of the "voting rights" cases, appellants are, in effect,

insisting that any grant of extraterritorial authority by a state to its municipalities stands on the same footing as arbitrary impairment by state action of a citizen's right to vote.

A citizen's right to a vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the Constitution. *Baker* v. *Carr*, 369 U.S. 186 (1962).

In addition, the law established in the "voting rights" cases is Appellants' only vehicle to insist upon the "compelling state interest" test in the application of Due Process and Equal Protection under the Fourteenth Admendment.

This court has held that statutes limiting the franchise should be given a close and exacting examination since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights; that any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized; that this is necessary "since statutes distributing the franchise constitute the foundation of our representative society." *Kramer* v. *Union Free School District*, supra; *Dunn* v. *Blumstein*, supra.

Surely, the granting of extraterritorial jurisdiction by a state to its political subdivision does not constitute an attack on the "foundation of our representative society." Clearly, a citizen's right to vote, free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. *Baker* v. *Carr*, supra, but the Appellants point to no case holding that a grant of extraterritorial jurisdiction to a municipality has been held to be, per se, constitutionally infirm.

Appellants in this case urge the court to strike down a state statute which extends police and sanitary regulations beyond the city's territorial limits and allows such regulations to be enforced equally, both within the corporate limits and within the area known as the police jurisdiction as being, per se, unconstitutional under the Fourteenth Admendment. In order to accomplish this, Appellants would have the Appellees bear the burden of proving compelling state interest under the Fourteenth Amendment. Appellants urge abandonment of the traditional standards set out in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), as follows:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state system be shown to bear some rational relationship to legitimate state purposes." *San Antonio School District*, supra, 411 U.S. at 40.

If the court abandons the traditional standard of review as stated above, Appellees believe the court would be doing that which was proscribed in *San Antonio School District* where it was stated:

> "It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School District, supra*, 411 U.S. at 33.

LITTLE THUNDER DISTINGUISHED

Appellants analogize the facts of the instant case to that of *Little Thunder* v. *State of South Dakota*, 518 F.2d 1253 (8th Cir. 1975), and it is insisted that residents of the Tuscaloosa Police Jurisdiction are

governed by the municipal authorities, although the allegations of the complaint to that effect are meager.[1]

Little Thunder dealt with a unique situation involving three counties and reservation Indians, which probably does not otherwise exist in the United States. Appellees argue that the organized county and attached unorganized county were encompassed by the same geographic and political boundary. That once a county was attached for government, then, for all practical purposes, the boundary of the organized county is simply extended to encompass the unorganized county. As stated by the court:

> "Here, however, as plaintiffs' urge, each of the unorganized counties and the organized county to which it is attached form a single unit of local government for administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, excepting in cases where the administration of said affairs is expressly otherwise provided by law." *Little Thunder* v. *State of South Dakota*, supra, 518 F.2d at 1256.

Actually, the unorganized county was brought under and became a part of the organized county, and yet the franchise, although given, was extended only to permit the residents to vote for school board members

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1 Any payment of a fee or charge by a person in the police jurisdiction would be paid by an industry or a merchant or a builder or some person either in business of building houses or developing subdivisions, and not one of the named Plaintiffs is alleged to fit this classification. There is no allegation of any specific incidents where a mere resident or homeowner has suffered any hurt from the authority of the city to enforce its police and sanitary regulations and yet, from aught that appears, each of the named Plaintiffs stand in that position.

and highway officials. They were not permitted to vote for all other elected officials.

The powers and authorities enumerated by the court, in *Little Thunder*, which the County Board of the organized county exerted over the unorganized county could, with minor exceptions, be a recitation of the authority that the Tuscaloosa County Commissioners exert over that area known as the Police Jurisdiction of the City of Tuscaloosa and the residents thereof.

The Tuscaloosa County Commission is a unit of local government for administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, excepting in cases where the administration of said affairs is expressly otherwise provided by law.[1]

County Commissioners (in Tuscaloosa County) have the authority to enact the rural and airport zoning regulations; construct and repair bridges and highways; designate through or main highways, (subject to state highway director's rules); establish and maintain public parks, county fairs, and free libraries; contribute to health centers; provide for assistance and deputies in county offices; generally supervise the fiscal affairs and levy taxes on all property in the county.

In effect, the Tuscaloosa County Commission manages and governs not only those people residing in the police jurisdiction, but also the citizens residing

1 Code of Alabama, 1975, Title 11, Chapters 1 through 22, contains much of the authority granted to the County and its governing body.

within the corporate limits of the City. The County has a Probate Judge who maintains register of deeds, records all deeds, mortgages, or instruments required to be filed. The County Commission and the Probate Judge are responsible for maintaining the fiscal integrity of county government. The County Tax Collector is charged with the duty of collecting taxes and the Tax Assessor is charged with the duty of assessing taxes; the County Sheriff is obliged to keep the peace and is the chief law enforcement officer of the County. The county has an elected Coroner.

All of these county officials are voted for and elected by members of the police jurisdiction. They are not governed by the adjacent municipal corporation in any sense of the word.

Possibly, a listing of authorities that the governing body of the municipality does not possess, outside of its corporate limits, would be persuasive.

The City does not levy or collect taxes and has no right to make any charge for general revenue purposes; the City does not have any control or jurisdiction of streets, roads or highways, which serve the Police Jurisdiction outside of the City; the City does not control or operate parks and recreation within the Police Jurisdiction, since this function is performed by a County Park and Recreation Board; the City does not provide a hospital, since a County Hospital is provided, controlled by an independent County Hospital Board; the City may not condemn lands outside of the Corporate Limits for public or park purposes unless under a specific grant under the State Legislature; the City performs very limited health services since the County and State Boards of Health are vested with this authority; the City performs no function pertain-

ing to voting, preparation of qualified electors lists, or establishing voting districts outside of the City; the City does not maintain a public library, but contributes to a City-County Library serving all the people of the County and controlled by a separate Library Board; the City exercises no zoning outside of its Corporate Limits, nor does it operate or exert any control over the schools or school system outside its boundaries.

In the State of Alabama, a municipality is simply and solely a creature of the state and possessed only of those powers expressly conferred upon it by law or necessarily implied from such express grant.

> "Municipalities are mere instrumentalities of the State, and possess only such powers as may have been delegated to them by the Legislature." *City of Leeds* v. *Town of Moody*, 294 Ala. 496, 319 So.2d 242 (1975).

We submit that that area of the police jurisdiction outside of the corporate limits is not governed by the governing body of the City of Tuscaloosa and the facts in *Little Thunder* are not analogous to those in the instant case.

ALTERNATIVE METHODS

Appellants suggest alternative means by which legitimate state purposes could be achieved in the area immediately surrounding a municipality without extending police and sanitary regulations beyond the city's territorial limits. (Appellants' Brief, Pages 24-27).

We do not doubt that there may be as many proposals, as to the type and form of legislation available to achieve state purposes, as there are teachers of political science, but the question here is not whether

we like the system, agree with the system, or could devise another system. All those questions are matters for the duly elected state governing body to determine so long as constitutional boundaries are not transgressed. *Salyer Land Co.* v. *Tulare Water District*, supra, 410 U.S. 719 at 732 (1973); *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

GOVERNMENT WITHOUT FRANCHISE

At Page 27 and following of Appellants' Brief, Appellants argue that government without representation or government without franchise is a violation of the Due Process of the law.

Without doubt, the "guaranty clause" of the Constitution does guarantee the right to vote.

As stated by Mr. Justice Douglas, in his concurring opinion in *Baker* v. *Carr*, supra, 369 U.S. at 242:

> "The right to vote is inherent in the republican form of government evisaged by Article 4, Section 4, of the Constitution."

We maintain, however, that the Appellants are in no sense of the word governed. Appellants herein vote for their state senators and state legislators who fashion the laws complained of in this suit. Those same state legislators and senators create or dissolve municipal corporations. Here, the statutes, (authorizing police and sanitary regulations to extend beyond the city's territorial limits), were enacted by a legislature in which all of the State's electors had the unquestioned right to be fairly represented. *Associated Enterprises* v. *Toltec District*, 410 U.S. 743 (1973).

The question presented here is, can the duly elected representative body provide, by general law, that some

police or sanitary regulations may extend beyond the city's territorial limits and, thus, be enforced both within the municipal corporation and within a limited area bordering the municipal corporation?[1]

WRONG REMEDY REQUESTED?

We answer Appellants' argument that the court should not have dismissed the complaint because the wrong remedy was prayed for and that the court erred in not granting the residents of the police jurisdiction the right to vote as follows:

First, the Appellants misconstrue the Court's order, which did not indicate that Appellants were entitled to be given the right to vote, but simply, in passing, referred to the fact that the Plaintiffs "do not seek an extension of the franchise for themselves".

Secondly, we point out that since the basic right to vote is not present, and since Appellants and the class of persons whom they seek to represent have never

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1 We point out that, although Tit. 37, Sec. 9, states that ordinances of a city or town enforcing police or sanitary regulations, and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof . . . (the word "shall" have force and effect, not the word "may" have force and effect, is used), many city ordinances are, by their terms, limited to the corporate limits and others, even when not so limited, are not enforced without the corporate limits.

The application and enforcement of police and sanitary regulations is not financially beneficial to a municipality. Areas differ widely. One area may be entirely rural and require little, if any, extraterritorial enforcement, whereas, other areas which may have developed, and developed in particular or peculiar ways, may seek more such regulation. No two regulations are alike, and no two cities are required to extend territorial jurisdiction of police and sanitary regulations on a like basis.

been made a part of the electorate, they are simply not entitled to vote. Appellants are not within the class of voters chosen and whose qualifications have been specified. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

The statement appearing at Page 31 of Appellants' Brief that:

> "The relief requested would not disrupt innovative state governmental experiments because the authority challenged is virtually unique and not of recent origin";

was apparently inserted to counter the often quoted statement by this court that:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the constitution to prevent experimentation." *Hadley* v. *Junior College District*, supra, 397 U.S. at 59; *Sailors* v. *Kent Board of Education*, 387 U.S. 105 (1967) at 110-111.

Such an argument we believe is not persuasive when determining whether or not a state statute transgresses the federal constitution.

On the other hand, we believe that the above statement is recognition by this court that nearly every municipality is faced with the problem of granting services within its expanding boundaries and attempting to bring order to the rapid and sometimes chaotic development in the area immediately surrounding the municipality and that the state has an interest in the orderly development and minimal control of the area sometimes called "suburbian area" or "suburbia" im-

mediately adjacent to the boundaries of the municipal corporation; that these areas are ones which are or soon will be seeking incorporation into the corporate limits; seeking services in the nature of water, sewer, sanitation, police, fire, zoning and health protection. Although developing industrially, the State of Alabama has long been a rural state, and rural cut-over areas surrounding the municipality are often ill able to afford and to provide police, fire and health services. It is beneficial to the residents of this rural area to be able to call on and depend upon some enforcement of police and sanitary regulations. At the same time, the municipality is often faced with undesirable, unhealthy, or unsanitary conditions developing in close proximity to its borders and some minimal control is beneficial to the municipality. Thus, the extraterritorial jurisdiction has in the past functioned, and does now function, as a benefit both to the municipality and to the surrounding area which it serves. Certainly it bears rational relationship to legitimate State purposes.

More recently, when the trend has turned to suburbian development and to the movement of business and industry from the central city, it is usually the municipality which is equipped and staffed to provide some planning control, some subdivision control, some supervision of orderly development to prevent the annexation of substandard areas requiring immediate urban renewal. At the same time, the rural and sparsely populated area, (prior to growth and development), is not so staffed and equipped and can ill afford a duplication of such services.

We urge the court to find that the above are facts which "reasonably may be conceived to justify" Alabama's decision to extend police and sanitary regulations beyond the City's territorial limits. *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719 (1973).

We urge the court to adopt the view that the granting of extraterritorial regulation to a municipality by the state is not, per se, a violation of a federally protected right and that "save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs". *Sailors* v. *Kent Board of Education*, supra; *Gomillian* v. *Lightfoot*, 364 U.S. 339 (1960).

Appellees urge this court to affirm the judgement of the three judge court.

Although the single judge court had dismissed the case on motion, the Fifth Circuit reversed and held that the issues were required to be heard by a three judge court. In this posture, the three judge district court accepted the case.

It has been, and is, the argument of the Appellees that under the meager allegations of this case, if case or controversy and standing could be found, in the absence of alleging hurt or injury by any specific ordinance adopted pursuant to the enabling legislation, then the only question substantially presented is whether or not extraterritorial regulation is unconstitutional, per se, under either the Equal Protection or Due Process Clause.

CONCLUSION

The District Court's ruling that, under the facts in this case, extraterritorial regulation is not, per se, unconstitutional under either Equal Protection or Due Process Clause and granting Plaintiffs leave to amend and specify particular ordinances which are claimed to deprive Plaintiffs of liberty or property, was correct and should be affirmed by this Court.

Respectfully submitted,

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